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The report is a critical evaluation of the Immigration Act of Canada and how it structurally and explicitly discriminates against the entry of persons with mental handicaps into Canada. Pertinent sections of the act and their application as described in selected appeal cases are analyzed. It is concluded that the Canadian immigration law actually discriminates behind a cloak of fair play. (DB)

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Mentally Handicapped Persons and Immigration: A Brief Review

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Author's Notes

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Abstract

This brief report is a critical evaluation of the Immigration Act of Canada and how it structurally and explicitly discriminates against the entry of persons with mental handicaps into Canada.

The intent of this short project was to identify the legal status of persons with a mental handicap (MH) in the Canadian Immigration Act. This was prompted by a concern that the Immigration Act possibly discriminates against adults with a MH, making it almost impossible for them to enter Canada and become Canadian citizens.

The following, then, is a summary of the pertinent sections of the act and their application as described in selected appeal cases.

Review

Presently, Canadian immigration law is based on the 1976 Immigration Act. This Act received Royal Assent in early April, 1978, and replaced the previous Act of 1952. The Old Act was an outgrowth of the legislation dating back to the turn of the century, reflecting many of the attitudes, circumstances and conditions of an earlier era.

> The Old Act contained many archaic provisions--it prohibited the admission of groups such as epileptics and the mentally ill; it took a harsh approach to deportation, and it permitted refusal of immigrants on the basis of nationality, citizenship, ethnic groups, occupation, class or geographic area. Though most of these provisions had been abandoned in practice for many years, they were still, in theory at least enforcable. (emphasis added; Canada, 1978:5)

The act of 1952 was also a product of the "Red Scare" and reflected the anti-communist feelings of the day. The Act of 1952 made it very difficult for what are now considered "refugees" to immigrate and become Canadian citizens. This was particularly true of Asians leaving countries that were within the

sphere of communist influence.

Thus, it became the explicit intention of the New Act to safeguard against such discriminatory measures as those held in the 1952 Act. In fact, the New Act claims to be "...based on such fundamental principles as non-discrimination; family reunion; humanitarian concern for refugees; and the promotion of Canada's social, economic demographic, and cultural goals" (Canada, 1978:5).

However, a review of the act and its regulations suggests that the improvements in immigration made in the areas of reducing discrimination; and promoting humanitarian concerns and promotion of Canada's social, economic and cultural goals have not been enjoyed equally by those with MH.

Because of the ever increasing number of applications for admission to Canada, the New Act sets out a broad processing priority system. This system is based on the principles of family reunion and compassion for refugees, with immediate family members and refugees receiving the highest priority (Canada, 1978:9).

Section 6(1) of the Act sets forth the three basic classes of admissible immigrants--the family class (those sponsored by a Canadian citizen), conventional refugees (those persons who fear persecution in their home country), and independent immigrants who apply on their own initiative. Accompanying the rating of one's immigration 'class' is also a point system for which each class is required to score a certain point value from 10 groups of factors: education completed, vocational preparation,

vocational experience, demand for their occupation in Canada, pre-arranged employment, planned destination in Canada, age between 18-35, knowledge of English and French, personal suitability and the presence of an assisting relative.

The emphasis in the point system is placed on practical training, experience and capability, so that employment-related factors now account for almost half of the total possible rating points that can be awarded. Not every applicant has to meet all ten selection criteria. Applicants are assessed only according to those factors which are considered to relate to their becoming successfully established Canadians. In order to be admitted to Canada as a permanent resident, every successful immigrant must receive a minimum number of assessment points: entrepenuers must be awarded at least 25 points; assisted relatives must earn 20 to 35 points, depending on the nature of their relation to the Canadian resident who is sponsoring them; all other applicants rated under the point system must earn 50 points, out of a possible 100, before they can be issued immigrant visas (Canada, 1978:13-14).

With the emphasis placed on employment related factors, it is difficult for a person with a MH to be accepted as an "independent" immigrant. This is due to the fact that most persons with MH would obtain a low score on the education and vocational attainment factors. Yet, the requirements of the point system also make it almost impossible for them to score high enough to be accepted in the "family class" where they must score at least 20 points. The point system is relaxed when one

applies to be accepted as a "Convention Refugee". However, a government or private Canadian organization must promise to provide them with food and shelter for a period of one year. As well, they must be able to show that they wish to leave their country of origin based on "well founded fears of persecution for reasons of race, religion, nationality, or membership in a particular group" (Canada; 1983:11).

It would appear that the Act does not promote human dignity insofar as allowing a person with a MH to enter the country as an independent adult who seeks to advance his/her circumstances in life while living within his/her limitations.

Even if the above factors do not disqualify the person with a MH, another hurdle must be overcome. Many of these persons have secondary health problems (cf. Rubin, 1987), and so through Section 19 of the Act (Inadmissable Classes) may be denied immigration to Canada.

> 19(1)(a) no person shall be granted admission if [they are a] person who is suffering from any disease, disorder, disability, or other health impairment as a result of the nature, severity or probable duration of which, in the opinion of a medical officer.
> (i) they are likely to be a danger to public health or public safety, or
> (ii) their admission would cause or might reasonably be expected to cause excessive demands on health or social services. (emphasis added)

While there is nothing in Sections 19(1)(a) and (b) that specifically state that persons with a MH do not qualify for admission to Canada, it does disqualify anyone who may "reasonably be expected to cause excessive demands on health and social services" (Canada, 1986a). Besides their mental handicap,

this population has a higher than average rate of chronic illness (such as epilepsy, diabetes, heart conditions). However, as is also well documented, those persons with these chronic disabilities experience them in a vast range of severities as well as levels of competency for living independently.

The significance of the Acts of Parliament lie in the "spirit" in which they are interpreted. The interpretation of what is "reasonably expected" to cause an "excessive demand" on Canada's health system are the privileged judgement of the individual immigration officers whose mandate it is to uphold the Act. As already cited, while the law may not necessarily be used to block the immigration of adults with MH "...they were still, in theory at least, enforcable" (Canada, 1978:5). Therefore, it is not 'unreasonable' to assume that by virtue of their diagnosed condition (from the mandatory medical examination) the person with a MH would be seen as requiring a higher rate of health and social service attention than non-mentally handicapped individuals. Thus, the existence of this exclusionary clause in the Immigration Act makes it possible for those with MH to be seen as an economic and social burden first and foremost and only secondly, as valuable new citizens who could contribute to "Canada's social, economic, demographic, and cultural goals" (Canada, 1978:5).

The means by which someone is denied admission based on the "reasonable expectation" that they will be a burden to the health of social services of Canada is set out in Sections 21 and 22 of the Immigration Regulations (Medical Examinations). Section

21(a) states that a medical examination is required "...[by all] persons seeking to engage or continue in employment in Canada; in an occupation in which protection of public health is essential".

The only exceptions to this are members and families of the Armed Forces and Foreign Diplomats.

In Section 22 of the Immigration Regulations, the means by which someone's admission is "..reasonably expected to cause excessive demands on health or social services..." is set out. A specific set of factors (as follow) are set out, which must be considered by the medical examining officer "...in relation to the nature, severity, or probable duration of any disease, disorder, disability, or other health impairment from which the person is suffering". These are Sections 22(a)(b)(c)(d)(e)(f)(g) and (h), and are the legal medical basis on which an individual could be disqualified from admission to Canada; namely:

(a) any reports made by a medical practitioner;
(b) the degree to which the disease, disorder, disability or other impairment may be communicated to other persons;
(c) whether medical surveillance is required for reasons of public health;
(d) whether sudden incapacity or unpredictability or unusual behaviour may create a danger to public safety;
(e) whether the supply of health or social services that the person may require in Canada is limited to such an extent that
(i) the use of such services by the person might reasonaly be expected to prevent or delay provision of those services to Canadian citizens or permanent residences, or
(ii) the use of such services may not be available or accessible to the person;
(f) whether medical care or hospitalization is required;
(g) whether potential employability or productivity is affected; and
(h) whether prompt and effective medical treatment can be provided. (emphasis added)

While the "new and improved" act purports to not discriminate against epileptics (as was done explicitly in the 1952 Act), it implicitly discriminates against this very same group. Section 22(d) and (f) of the Immigration Regulations describe for exclusion the most common manifestations of epilepsy: sudden incapacity and unpredictable behaviour. Without qualification as to frequency or duration, the regulations also deem the anticipated need (based on the medical examiners' opinion) for medical care or hospitalization as also exclusionary.

It may be suggested that to avoid this labelling, the person with a MH could choose to forego the medical examination as it is required primarily by those seeking employment in a way that involves the public (and public safety). However, there is a "safeguard" against this built into the Act. Section 19(1)(b) of the Act states that an individual can be disqualified from admission if

> ...there are reasonable grounds to believe [they] are or will be unable or unwilling to support themselves and those persons who are dependent on them for care and support, except persons who have satisfied an immigration officer that adequate arrangements have been made for their care and support. (emphasis added)

This appears to be a catch-22 situation for those with MH. If persons with a MH wish to work they must first undergo a medical examination, which could "reasonably" deem them an undue risk or expense to Canadian society. Yet, by stating that they do not intend to work full time they can be expelled from the country (or denied admission[1]) because there will be reasonable

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grounds to assume that "they are or will be unable or unwilling to support themselves" (Immigration Act of 1976, Section (19)(1)(b)). The only exception to this is if they are willing and able to develop (as a consenting adult) a dependency relationship in which someone else claims responsibility for them.

Conclusion

There is an inherent injustice in any system that refuses to grant its more vulnerable citizens equal value. To disregard the range and magnificent diversity of the human mind in favour of the "upper end" of the distribution, suggests a disregard for the individual. It fails to demonstrate an understanding of human diversity and of the value of individual difference. While a new immigrant with a mental handicap probably could never make the same economic contributions as one who has education and experience in a needed profession, he/she has as much (if not often more) to give socially to their new country. To admittedly discriminate is bad enough, but to hide behind the cloak of "fair play to all" as the Canadian Immigration law does, suggests fraudulent intentions. Luckily, we were not all created equal. Within each human lies a very interesting perspective specific to them and to disallow either the entrance or expression of such diversity in Canada, closes the door to democracy. Should we continue to allow one person's judgement to determine another person's work and right to a decent life in Canada?

Footnote

1. Admission as defined in the Act, denotes status. It has no geographical significance. Once a person physically in Canada reports to the nearest immigration officer, pursuant to Section 7(c) he is deemed to be "seeking admission to Canada" and is clearly in no different position from a person, physically outside of Canada, who is "seeking admission" to the country (Canada, 1969:5).

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